**Visiting Nurse Services of Western Massachusetts, Inc. *and* Service Employees International Union, Local 285, AFL–CIO, CLC.** Case 1–CA–34580

July 20, 1998

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On a charge and an amended charge filed September 30 and November 12, 1996, respectively, by Service Employees International Union, Local 285, AFL–CIO, CLC (the Union) the General Counsel of the National Labor Relations Board issued a complaint and an amendment to the complaint on December 31, 1996, and April 24, 1997, respectively, against Visiting Nurse Services of Western Massachusetts, Inc. (the Respondent).[1] The complaint, as amended, alleges that the Respondent violated Section 8(a)(5) and (1) the Act by failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally implementing changes in terms and conditions of employment of the employees in the bargaining unit, without affording the Union an opportunity to bargain with the Respondent about the above conduct and the effects of that conduct. The Respondent filed a timely answer to the complaint, admitting in part and denying in part the allegations, and asserting that certain allegations were time barred under Section 10(b) of the Act, and that the Union waived its right to further bargaining about certain of these subjects when notified of the Respondent's contemplated implementation of them.

On June 13, 1997, the Respondent, the Union, and the General Counsel filed with the Board a stipulation of facts and motion to transfer this proceeding to the Board. The parties agreed that the charge and amended charge, the complaint and amended complaint, the answer to the complaint, and the stipulation of facts, together with the exhibits attached to the stipulation of facts, constitute the entire record in this case, and that no oral testimony is necessary or desired. The parties waived a hearing before an administrative law judge, the makings of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and submitted this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order. On August 14, 1997, the Board approved the stipulation of facts, granted the motion, and transferred this proceeding to the Board. The General Counsel and the Respondent filed briefs, and the General Counsel and the Union filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and the briefs, the Board makes the following

### FINDINGS OF FACT[2]

#### I. JURISDICTION

The Respondent, Visiting Nurse Services of Western Massachusetts, Inc., is a corporation with an office and place of business in Holyoke, Massachusetts, and is engaged in the business of providing health care services to patients in their homes. Annually, the Respondent derives gross revenues in excess of $100,000 in the course of performing its services, and purchases and receives at its Holyoke facility goods valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care provider within the meaning of Section 2(14) of the Act. The Union, Service Employees International Union, Local 285, AFL–CIO, CLC, has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

The issue presented is whether, during negotiations for a successor collective-bargaining agreement, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing five of its proposals in the absence of an overall impasse in bargaining for the agreement as a whole. Specifically, the General Counsel alleges that the Respondent acted unlawfully when it implemented (1) a change from a weekly to a biweekly payroll schedule; (2) changes in job classifications; (3) changes in holiday pay; (4) a clinical ladders program; and (5) an enterostomal therapist classification and program.

[1] The Respondent changed its corporate name from Holyoke Visiting Nurses Association, Inc. (Holyoke) to its present name in about May 1996. The parties have stipulated that the Respondent is identical to Holyoke and that its name change is not otherwise relevant to this proceeding.

[2] In his reply brief, the General Counsel requests that certain factual assertions contained in the Respondent's brief be stricken, on the asserted grounds that they are outside the stipulated record. In making our findings of fact and in reaching our conclusions of law, we have relied only on facts within the stipulated record. Accordingly, we find it unnecessary to strike from the Respondent's brief any factual assertions that are outside the stipulated record. Rather, we have simply not considered any such factual assertions.

## A. *Stipulated Facts*

### 1. The unit

The following employees of the Respondent constitute a unit (the unit) appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

From about 1980, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which (the contract) was effective from November 1, 1991, to October 31, 1992. At all times since about 1980, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.[3] Although no new collective-bargaining agreement has been reached since the expiration of the contract, the parties have reached periodic agreements, during the course of their negotiations, to implement such items as wage increases, changes in insurance plans, a tuberculosis plan, and dental insurance.

While the parties were engaged in negotiations for a new collective-bargaining agreement, a decertification petition was filed in late 1994, and a decertification election was conducted in January 1995. The Union won the election and a Certification of Representative was ultimately issued to the Union on December 20, 1996.

### 2. Negotiations and contemporaneous activity

Following the January 1995 election, the parties met and negotiated for a new contract on the following dates:

| *1995* | *1996* | *1997* |
|---|---|---|
| July 12 | Feb. 29 | Mar. 20 |
| Aug. 11 | Apr. 25 | |
| Oct. 12 | June 18 | |
| Nov. 2 | | |
| Dec. 6 | | |

[3] Art. 1, *Recognition Clause*, of the contract states in relevant part that the Respondent recognizes the Union as the exclusive bargaining representative of the Holyoke employees ''in accordance with the certification of the National Labor Relations Board, Region One certification date, November 10, 1980.''

With respect to the five items in issue, the relevant facts can be summarized as follows.

#### a. *October 12, 1995 session*[4]

The Respondent's vice president of Clinical Services, Deb Patulak, said that there was a need to have care delivered in ''special areas.'' The contract sets forth only two classifications of nurses: registered nurses and senior staff nurses.[5] According to the Respondent's attorney, Bert Mason, there would be three separate seniority lists by classification when the proposed classifications went into effect. The Respondent would maintain these lists and provide them to the Union. Mason and Union Negotiator Glenn Daviau recognized that a change in classifications would ''change weekends, holidays, vacations, everything else.''

The parties also discussed the Respondent's proposal to change from a weekly to a biweekly payroll system. The Respondent's vice president for finance, Diane Poole, assured the Union that the employees would not receive any less take-home pay under a biweekly payroll system than they received under the existing weekly payroll system. Poole agreed to provide the Union with comparative examples of take-home pay under a weekly versus a biweekly system. Daviau asked about the specifics of implementation of a change to biweekly payroll, and asked when the Respondent wanted to implement the change. Mason said not later than January 1996. Union Negotiator Nancy Geneczko said that ''the employees are really concerned about this.''

#### b. *November 2, 1995 session*[6]

The Respondent presented a written package proposal. On the first page, the proposal states in pertinent part:

> All proposals are and will be set forth based on a package bargaining basis. This means that if any portion of the package is unacceptable then the whole package is subject to revision. In this respect . . . if there are tentative agreements in a package but the whole package is not accepted then the tentative agreements are also subject to revision, deletion, addition, change etc. . . . **all agreements will be subject to an acceptable total ''final package'' agreement** . . . . [emphasis in original].

[4] There is no evidence about the July 12 and August 11, 1995 negotiating sessions. The following accounts of statements made during the various negotiating sessions are based on the contemporaneous handwritten notes of the Union's codirector of its Health Care Division, Tom Higgins, and various Respondent representatives, all of whom attended these meetings.

[5] Art. 42, *Rate of Pay and On-Call Rate*, secs. 1 and 2.

[6] All the following dates are within the period November 1995 through October 1996, unless otherwise stated.

The proposal provided that the following language be added to the new contract, in regard to classifications:

> It is also understood and agreed to that the term classification is to be defined solely by the employer and that the employer has the absolute and unequivocal right to make the determination that classifications for employees within the bargaining unit have to be added, deleted, modified, changed or altered in any way, however the union has the right to bargain as to ''**the impact**'' of any such changes. [Emphasis in original.]

Union Negotiator Tom Holesovsky said that the Union was willing to bargain about classifications and operational needs. The Respondent supplied the Union with seniority lists by classification, as of October 31, in response to the Union's desire to see what the classifications proposed by the Respondent would look like.[7]

The proposal also provided for a 2-percent wage increase, to be effective November 6, and also provided ''***PAYROLL TO BE BI-WEEKLY*** **[emphasis in original]**.''[8] Poole presented comparative weekly and biweekly payroll examples.

c. *December 6, 1995 session*

The Respondent presented another written package proposal, substantially identical in relevant part to those parts of the Respondent's November 2 written package proposal. The December 6 proposal also provided that the Respondent would have the sole and unqualified right to designate classifications as it deemed necessary based on operational needs.

Mason said that he did not think that implementing the proposed 2-percent wage increase, effective retroactively to November 6, would be a problem as long as the Union agreed to a biweekly payroll and the ''classification issues.'' The parties then discussed the meaning and effect of, and possible changes in, the wording in the Respondent's proposal about seniority by classification.

d. *January 3, 1996 memorandum*

Poole sent a memo to all bargaining unit employees, stating ''As we are contemplating implementing biweekly payroll, [the Union] requested during our last negotiation session that I distribute the following materials.'' Attached to the memo were copies of the biweekly payroll examples that the Respondent had presented to the Union at the November 2 negotiating session.

e. *February 29, 1996 session*

Mason said that the Respondent was offering the 2-percent wage increase effective retroactively to November 6 in return for union agreement to the Respondent's proposals for a biweekly payroll system and the changes in classifications. The Union did not agree to this proposal. Holesovsky said that the Union had presented the biweekly payroll and classification issues to its membership. He said there were a lot of questions about classification and that the issue was fully discussed. Holesovsky said that classification was not really an issue with the employees in attendance at these meetings,[9] but that there was broad opposition within the membership to the proposal for biweekly payroll. The Respondent caucused, and on returning to the bargaining table, revised its wage offer by removing retroactivity to November 6, and proposing a 2-percent wage increase effective April 7. Mason said that retroactivity of a wage increase to November was no longer acceptable to the Respondent, but that there were no other changes to the Respondent's December 6 written package proposal.

f. *March—April 1996 correspondence*

On March 8, the Respondent distributed a memorandum, in question and answer format, to the unit employees, including stewards (this memo was not sent to the Union). The memorandum discussed the Union's rejection of the Respondent's February 29 proposal. The memorandum concluded that ''[n]egotiations will still continue as scheduled.''

On March 21, Mason notified Higgins by letter that:

> [B]ased on economic and operational realities the Agency intends to implement ''both'' the wage increase and the bi-weekly pay proposals that, to date, we have been unable to agree on.

The letter further stated that the wage increase and change to biweekly payroll were to become effective on April 7 and May 3, respectively, and that:

> [B]oth of these proposals are being implemented as we do want our staff to be able to obtain their economic increases when they are normally due. In addition, the bi-weekly payroll proposal and its corresponding reduction in costs is intrinsically tied to the realities of cash flow concerns and the wage increase being provided.

[7] There were six such lists: maternal child health (6 employees); physical therapist (1); senior staff nurses (3); social workers (5); hospice (5); and medical/surgical (39).

[8] The parties stipulated that the Respondent proposed implementing this wage increase and change to biweekly payroll, both to be effective November 6, at either the November 2 or December 6 negotiating session, and that no agreement was reached regarding this proposal at either of these two sessions.

[9] Geneczko said that there had been 2 meetings, and that there had been ''scattered representation'' of the approximately 75 unit employees.

> If you have any questions, concerns or proposals concerning this matter, please do not hesitate to contact me.

On March 26, Higgins replied by letter to Mason, stating in pertinent part:

> We oppose the unilateral implementation of the bi-weekly payroll system. We request that the Agency not implement the bi-weekly payroll system until we come to agreement in negotiations. . . . You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we have rejected that combined proposal.

g. *May 1996 events*

The Respondent implemented the biweekly payroll system on May 3. Around that time, the unit employees presented management with a petition signed by 35 unit employees (there were approximately 60 unit employees at that time), expressing their opposition to a biweekly payroll system and their regret that the Respondent had decided to implement this system over the Union's objections.

h. *June 18, 1996 session*

The Respondent presented another written package proposal. The ''WAGE PROPOSAL AND PAYROLL CHANGE'' section of this proposal stated ''Effective 7–7–96 2% increase to base rates of employees on the payroll as of the date of ratification.[10] **PAYROLL TO REMAIN BI-WEEKLY**'' [emphasis in original]. The proposed language concerning seniority by classification that was newly added to the December 6 written package proposal was carried over into the June 18 written package proposal.

The proposal also contained three new provisions, in regard to holidays, clinical ladders, and an enterostomal therapist classification and program.[11] Specifically, the proposal stated in pertinent part that the Respondent would remain open on Presidents Day, Patriots Day, and Columbus Day, and these holidays would become floating holidays that would be taken at a time requested by the employee, subject to approval by the supervisor involved. As for clinical ladders, the proposal provided that they were to be implemented by management as added incentive and income for quality performance and achievement as determined by management. The total clinical ladders program was to be subject to management discretion and none of its provisions or applications would be subject to grievance or arbitration. Finally, in regard to the enterostomal therapist classification and program, the proposal provided that it was to be implemented as determined by management, not subject to grievance or arbitration in any way and not subject to any of the provisions of the collective-bargaining agreement. Bargaining unit staff would be selected as determined by management and compensation was to be determined by management with the agreement that no bargaining unit staff would suffer a reduction in compensation by assignment to this program.

In addition to the total package proposed by the Respondent, it also proposed, in the alternative, another, much smaller package, containing items that the Respondent believed could be agreed on separate from a complete new collective-bargaining agreement. Thus, the proposal concluded that, in the alternative, in order to provide an increase to bargaining unit personnel and to allow the parties to continue bargaining as to a complete contract, the Respondent was willing to provide a 2-percent increase to base rates of employees on the payroll on July 7, 1996, and to continue bargaining for a complete contract as long as the wage increase and the above proposals on holidays, clinical ladders, and enterostomal therapist and classification program were agreed to while bargaining continued.

The Union asked questions about this alternative package, but was unable to agree to the proposal at that time. Due to a scheduling conflict, the Respondent had to conclude the session after an hour. The next negotiating session was scheduled for July 17.

i. *June—November 1996*

The Union canceled the July 17 session because it wanted to meet with its members to discuss the Respondent's June 18 proposals, but was unable to do so before July 17 because of vacation conflicts. No new session was scheduled by either party.

At a July 24 clinical staff meeting, Patulak discussed and distributed information about the proposed clinical ladder program. The handout describing the clinical ladder program states in pertinent part that:

> Clinical ladders are practices and achievements that are above and beyond one's standard job performance. Clinical Ladders enhance professional practice, ultimately improving patient care to individuals and families in the community. A monetary incentive accompanies each Step Level (to be determined). Each individual that meets the criteria for a Step on the clinical ladder will receive a monetary reward, professional recognition, and certificate of achievement. . . . This is a voluntary program.

[10] This proposed 2-percent wage increase to be effective July 7 was in addition to the 2-percent wage increase already implemented effective April 7.

[11] Enterostomal means relating to or having undergone an enterostomy. *Dorland's Illustrated Medical Dictionary* 524 (25th ed. 1974). An enterostomy is a surgical operation in which a permanent opening in the intestine is made through the abdominal wall. *Medical Dictionary for Lawyers* 274 (3d ed. 1960).

In an August 20 letter to Higgins from the Respondent's vice president for operations, Elizabeth Stroshine, the Respondent advised the Union that ''as of September 6, 1996, the agency is contemplating implementing the following'': (1) a 2-percent wage increase, retroactive to July 7; (2) starting January 1, 1997, the agency to remain open on Presidents' Day, Patriots' Day, and Columbus Day, with those holidays becoming personal floating holidays for employees to take at a time they request, subject to supervisory approval; (3) the clinical ladders program; and (4) the enterostomal therapist classification and program. Stroshine's letter concludes:

> [I]f you have any questions, concerns or proposals in regard to the above, please do not hesitate to contact me. To the best of my knowledge all of the above items are the ''positives'' that we discussed that could be implemented while bargaining for a successor agreement continued.

In response to this letter, Union Representative Tim DiSilva wrote to Mason on September 5, stating in pertinent part:

> We oppose the unilateral implementation of these proposals. The Union requests that you *not* make any changes to wages, hours or working conditions. Please do not hesitate to call me to arrange a meeting as soon as possible to discuss this and other outstanding issues [emphasis in original].

This letter was delivered to Mason on September 5.

In a September 13 memorandum from Stroshine to the bargaining unit, including stewards (but not sent to the Union), the Respondent informed the employees that it had implemented the alternative package that it proposed on June 18, and referred to in its August 20 letter to the Union (i.e., (1) the 2-percent wage increase, retroactive to July 7; (2) the change in holidays, as described above; (3) the clinical ladders program; and (4) the enterostomal therapist classification and program). Stroshine's memorandum concluded by stating that ''To our knowledge, we properly implemented this package of positive items that would benefit the agency as a whole.''

In a September 23 letter from Mason to DiSilva, the Respondent advised the Union that the items involved were ''items that had to be put into process for implementation on [September 6] . . . and . . . are already in process.'' The letter further stated that:

> [T]he items selected for implementation are only ''positive items'' . . . only meant to enhance the economic condition of the staff while bargaining on a complete contract continued. This is something that we have done before . . . .[12] [I]t is the Agency's position that the mini package involved has been properly implemented . . . .

In the summer of 1996, the Respondent sought a volunteer from among the unit employees to attend an enterostomal therapy certification program, and Sherry Ferro, an RN in the unit, volunteered to attend the program. She attended classroom sessions Monday through Friday, during her normal working hours, between October 7 through November 1, 1996. After completing the classroom session, she performed a preceptorship until about February 1997. The Respondent paid the cost of this training and also paid Ferro her full regular wages during the entire period of her training. In turn, she was required to commit to at least 3 years of continued employment with the Respondent.

j. *1997*

The Respondent and the Union met and negotiated a change in insurance plans on March 20, 1997. The parties filed their stipulation of facts and motion to transfer this proceeding to the Board on June 13, 1997, in which they stipulated (1) that the Respondent has not presented a ''final'' offer to the Union; (2) that no party has yet claimed that impasse has been reached on the entire contract; (3) that the Respondent asserts that impasse has been reached on the biweekly payroll, clinical ladders, floating holidays, enterostomal classification and program, and classifications; and (4) that the Union asserts that impasse has not been reached on these five items.

B. *Contentions of the Parties*

1. The General Counsel

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act, during negotiations with the Union for a collective-bargaining agreement, by unilaterally implementing the change to a biweekly payroll system on May 3; changes in classifications sometime subsequent to May 3; and a change in paid holiday structure as well as new clinical ladder and enterostomal therapist classification programs between August 20 and September 6, all without first either securing the agreement of the Union or bargaining to impasse on the entire contract. As authority for his position, the General Counsel relies primarily on *Bottom Line Enterprises*, 302 NLRB 373 (1991).

2. The Respondent

The Respondent contends that ''unilateral implementation of changes . . . is not a violation of the duty to bargain collectively, even in the absence of impasse, if the employer notifies the union that it intends to institute the change and gives the union the opportunity to

[12] During the course of their negotiations over the years, the parties have reached periodic agreements to implement wage increases.

respond to that notice.''[13] The Respondent argues that the Board should apply this ''notice and opportunity to bargain'' standard in the instant case and find that any unilateral changes the Respondent implemented were not in violation of the Act. More specifically, the Respondent contends that it (1) notified the Union in writing of the contemplated changes; (2) subsequently discussed these contemplated changes with the Union during negotiating sessions; (3) failed to obtain the Union's agreement to the changes; and (4) unilaterally decided to implement the changes. The Respondent also argues that there is no evidence that it made any changes at all with respect to clinical ladders and the enterostomal therapist classification and program.

The Respondent further contends that the complaint allegation concerning the change to a biweekly payroll system is procedurally barred by Section 10(b) of the Act.

### C. *Analysis and Conclusions*

#### 1. The Respondent's 10(b) argument

On September 30, 1996,[14] the Union filed the initial charge alleging that ''[o]n or about September 6, 1996,'' the Respondent violated Section 8(a)(5) and (1) by making ''unilateral changes to the wages, hours and working conditions of bargaining unit employees.''[15] The complaint alleges that on May 3 (less than 6 months prior to the filing of the initial charge) the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a biweekly payroll system.

In deciding whether a charge allegation provides a sufficient basis for a complaint allegation, the Board examines whether the allegations that are asserted to be barred by Section 10(b) are ''closely related'' to the allegations of a timely filed charge. In applying this test, the Board considers the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. See *Dynatron/Bondo Corp*., 324 NLRB No. 98 (Sept. 30, 1997); *Redd-I, Inc*., 290 NLRB 1115 (1988).

Applying this test, we find that all of these factors are satisfied here. First, the allegations involve the same section of the Act (Sec. 8(a)(5)) and the same legal theory (circumvention of the collective-bargaining process). Second, the allegations involve similar conduct (changing employee terms and conditions of employment) occurring during the May through September time period when the parties were engaged in negotiations for a successor collective-bargaining agreement. Third, as discussed above, the Respondent has raised common defenses to both the payroll change and the other allegedly unlawful unilateral changes. Accordingly, we find that the May 3 unilateral change allegation in the complaint is not barred by Section 10(b).

#### 2. Alleged 8(a)(5) unilateral changes

##### a. *Applicable principles*

As summarized above, there is a basic disagreement between the parties as to the legal standard that should be applied here. Although the Respondent relies on the ''notice and opportunity to bargain'' standard of the Fifth Circuit's *Pinkston-Hollar* decision, the Board did not adopt that standard in *Pinkston-Hollar II*,[16] and we decline the Respondent's invitation to do so now.[17] Rather, we agree with the General Counsel that as a general rule, when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse

[13] Quoting *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306, 311 (5th Cir. 1992), denying enf. and remanding *Pinkston-Hollar Construction Services*, 298 NLRB 1 (1990) (*Pinkston-Hollar I*), decision on remand *Pinkston-Hollar Construction Services*, 312 NLRB 1004 fn. 4 (1993) (*Pinkston-Hollar II*).

[14] All dates in this section of the decision discussing the 10(b) issue are in 1996.

[15] An amended charge specifically alleging that the change to a biweekly payroll system violated Sec. 8(a)(5) was not filed until November 12, more than 6 months after May 3, the date the parties stipulated the change occurred.

[16] 312 NLRB 1004 fn. 4.

[17] *Kentron of Hawaii*, 214 NLRB 834 (1974), and *Jim Walter Resources*, 289 NLRB 1441 (1988), relied on by the Respondent, are distinguishable.

In *Kentron of Hawaii*, the employer was found to have lawfully implemented a unilateral discontinuation of employee benefits for newly represented unit employees prior to the start of negotiations for an initial collective-bargaining agreement with the newly certified union. The Board found that the union failed to act with due diligence in response to the employer's notification to the union, 11 days after the union's certification as bargaining representative, that the employer intended to discontinue the benefits in question 3 weeks from the date of the notification.

In *Jim Walter Resources*, the employer was found to have lawfully implemented a unilateral discontinuation of its payment of medical insurance premiums for employees receiving disability payments during a strike, following expiration of the collective-bargaining agreement requiring the payment of such premiums and during a period when the parties were not in negotiations for a successor collective-bargaining agreement. The Board found that the union failed to act with due diligence in response to the employer's notification to the union of the employer's intent to discontinue the payments 10 days before the effective date of the discontinuation.

In the instant case, however, unlike in *Kentron of Hawaii* and *Jim Walter Resources*, the parties were actively engaged in negotiations for a collective-bargaining agreement at the time of the Respondent's unilateral changes.

on bargaining for the agreement as a whole.[18] There are two limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action.[19]

b. *Conclusions*

The parties stipulated that impasse has not been reached on bargaining for the agreement as a whole. Therefore, under the principles set forth above, the Respondent was obligated to refrain from making unilateral changes in unit employees' terms and conditions of employment.

The record clearly shows that the Respondent failed to fulfill that obligation and instead unilaterally implemented its contract proposals in five subject areas. Thus, with respect to the Respondent's proposed change to a biweekly payroll system, the Union notified the Respondent in writing on March 26, 1996,[20] that it opposed the change and requested that the Respondent not implement it until the parties could come to an agreement in negotiations. On April 2, however, the Respondent notified the Union that it had decided to implement the biweekly payroll, and on May 3 it did so, despite the fact that the parties did not come to an agreement in negotiations about this change.

With respect to the Respondent's proposals to change the holidays provision in the expired contract and establish both a clinical ladders program and an enterostomal therapist classification and program, the Union notified the Respondent in writing on September 5 that it opposed the unilateral implementation of these proposals, requested the Respondent not to make any changes in wages, hours, or working conditions, and invited the Respondent to contact the Union to arrange a meeting as soon as possible to discuss this and other outstanding issues. On September 13, however, the Respondent notified the unit employees in writing (not sent to the Union) that it had implemented the change in holidays, the clinical ladders program, and the enterostomal therapist classification and program. On September 23 the Respondent notified the Union in writing that it had implemented this change and these programs, effective September 6.[21] Just as with the biweekly payroll system, the Respondent made these changes without the agreement of Union and absent an overall impasse. Subsequently, in October, the Respondent, without consulting the Union, sent Registered Nurse Sherry Ferro to an enterostomal therapy certification program at the Respondent's expense and with full pay.

Finally, with regard to proposed changes in the contractual classification of nurses as RNs or senior staff nurses, the record shows that signups for nurses for holidays, weekends, and vacations are currently done by departmental classifications, i.e., Hospice Life Care; Medical—Surgical; and Maternal Child Health. These are the same three nursing department classifications for which the Respondent provided the Union with seniority lists at the November 2 negotiating session, to show the Union what the Respondent's proposed classifications would look like. The record shows no agreement by the parties to these changes. Accordingly, we find that the Respondent implemented changes in job classifications without the agreement of the Union and in the absence of overall impasse.

As to the two exceptions to the general rule, we find that neither is applicable. Thus, the Respondent does not contend, and the record does not show, either (1) that the Union was avoiding or delaying bargaining or (2) that economic exigencies compelled the Respondent promptly to implement the unilateral changes in question.

Therefore, under the general rule applicable here, the Respondent was prohibited from unilaterally implementing the above changes in employee terms and conditions of employment during negotiations for the collective-bargaining agreement, and the Respondent has violated Section 8(a)(5) and (1) of the Act in doing so.

## CONCLUSIONS OF LAW

1. The Respondent, Visiting Nurse Services of Western Massachusetts, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service Employees International Union, Local 285, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit (the unit) appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

[18] *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (negotiations for a successor collective-bargaining agreement); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (negotiations for an initial collective-bargaining agreement).

[19] *RBE Electronics of S.D.*, supra, 320 NLRB at 81; *Bottom Line Enterprises*, supra, 302 NLRB at 374.

Chairman Gould would also require an employer to show a compelling and substantial justification for such conduct even in these limited circumstances. See *RBE Electronics of S.D.*, supra at 82 fn. 12.

[20] All the following dates are within the period November 1995 through October 1996, unless otherwise stated.

[21] The Respondent's September 13 and 23 communications are part of the stipulated record. Accordingly, the Respondent is clearly incorrect in its assertion that there is no record evidence that it made any change with respect to clinical ladders and the enterostomal therapist classification and program.

All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

4. At all times since about 1980, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a biweekly payroll system on or about May 3, 1996; unilaterally implementing changes in holidays on or about September 6, 1996; unilaterally implementing a clinical ladders program and an enterostomal therapist classification and program on or about September 6, 1996; and unilaterally implementing changes in classifications during the time material, all at a time when the Respondent was in negotiations with the Union for a collective-bargaining agreement, and all in the absence of overall impasse over the entire collective-bargaining agreement.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. More specifically, having found that the Respondent unilaterally implemented a biweekly payroll system, a change in holidays, a clinical ladders program, an enterostomal therapist classification and program, and new classifications, all at times when it was prohibited under the Act from doing so, as fully discussed above, we shall order the Respondent, on request of the Union, to bargain collectively and in good faith with the Union on these and other terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement. Further, we shall order the Respondent, if requested to do so by the Union, to rescind the unlawful unilateral changes, to reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes, and to make the unit employees whole for any losses attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that the unlawful unilateral changes implemented by the Respondent may have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring the Respondent to rescind such improvements unless requested to do so by the Union.

The General Counsel and the Union have requested certain additional remedies.

### a. *Extension of the certification year*

As seen, a Certification of Representative was issued to the Union on December 20, 1996, after it won a January 1995 decertification election. The General Counsel, joined by the Union and citing *Mar-Jac Poultry*, 136 NLRB 785 (1962), contends that the effects of the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment tainted negotiations during the ensuing certification year, and that the Union should therefore be given the protection of a new certification year in which to bargain without fear of another decertification petition being filed, and free of unfair labor practices.

We find that the record fails to establish that an extension of the certification year is warranted here. There is no support in the record for the General Counsel's contention that the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. Indeed, the only record evidence of events subsequent to the December 20, 1996 certification shows that the parties had a negotiating session on March 20, 1997, at which they agreed upon a change in insurance plans. Citing this March 1997 negotiating session, the General Counsel acknowledges in his brief that ''the parties continue to meet and negotiate.'' Likewise, the Union asserts in its brief that the Respondent ''has continued to bargain well after [its] unilateral actions.'' Thus, the General Counsel and the Union do not contend, and the record does not show, that the Respondent has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the Union's certification. Nor does the record show that the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. The requested *Mar-Jac* remedy is therefore not supported by the record.[22]

### b. *Negotiating costs*

The Union contends in its brief that the Respondent has engaged in conduct here and in prior proceedings that is ''flagrant, aggravated, persistent, and pervasive,'' and that the Union has spent extensive time and resources engaging in bargaining that was continually set back by first the threat of, and then the consummation of, unlawful unilateral action. More specifically,

[22] *Cortland Transit*, 324 NLRB No. 66 (Sept. 18, 1997); *Tocco, Inc.*, 323 NLRB No. 72, slip op. at fn. 1 (Apr. 18, 1997).

the Union contends that bargaining from October 1995 until ''the present'' (i.e., the December 16, 1997 filing of its brief to the Board) has been marred and sidetracked by the Respondent's resort to the above unlawful conduct. The Union contends that the Respondent has deliberately attempted to isolate certain decisions from the vast majority of others and has flagrantly disregarded the Union's legitimate role. Thus, the Union contends that the policies of the Act will not be effectuated fully unless the Respondent makes the Union whole by reimbursing the Union for the costs of its negotiations with the Respondent.

The Union relies on *Frontier Hotel & Casino*[23] in support of its request that the Respondent be ordered to reimburse the Union's negotiating costs. There the Board found that the employer engaged in flagrant, egregious, deliberate, and pervasive bad-faith conduct aimed at frustrating the bargaining process, causing the union to waste its resources in a futile effort to bargain for an agreement that the employer never intended to reach, and rendering the bargaining between the parties ''merely a charade.''[24] The Board held that an order requiring a respondent to reimburse a charging party for negotiation expenses will be warranted in cases of unusually aggravated misconduct, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies.[25]

Applying that principle here, we find that the record fails to establish that an award of negotiating costs to the Union is warranted. The record, as fully discussed above, does not show that the Respondent has engaged in flagrant, egregious, deliberate, pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile effort to bargain for an agreement that the Respondent never intended to reach. Nor does the record show that the bargaining between the parties was merely a charade. The General Counsel does not allege, and the record does not show, surface bargaining on the part of the Respondent. Rather, the record shows that the parties met in a series of nine formal negotiating sessions during the period August 1995 through March 1997, and that they also corresponded with each other during that time. The record also shows, and both the General Counsel and the Union acknowledge, that the parties have continued to meet, negotiate and bargain during 1997, well after the Employer's unilateral actions. Under all of these circumstances, we do not find that reimbursement of the Union's negotiating costs by the Respondent has been shown to be warranted.

[23] 318 NLRB 857, 858 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997).

[24] 318 NLRB at 858.

[25] Id. at 859.

c. *Broad order*

Both the General Counsel and the Union have requested the issuance of a broad remedial order against the Respondent. We find that a broad order is warranted here.

In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board held that an order broadly requiring a respondent to cease and desist from restraining or coercing employees in the exercise of their Section 7 rights ''in any other manner'' (i.e., rather than more narrowly ''in an any like or related manner'') is warranted only when a respondent (1) has shown a proclivity to violate the Act or (2) has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. As fully discussed above, we have effectively found that the Respondent's unfair labor practices here do not come within the second category under *Hickmott Foods*. We do find, however, that the Respondent has shown a continued proclivity to violate the Act, and we shall issue a broad remedial order on that basis. More specifically, in April 1994, about 2 years before the May 3, 1996 onset of the Respondent's unlawful activity in this case, the Board issued a broad remedial order against the Respondent in another proceeding, based on the Respondent's proclivity to violate the Act.[26] Inasmuch as the Respondent has continued to violate the Act in this case, notwithstanding the broad remedial order issued against it in the previous case, we find a broad remedial order to be fully warranted here.

ORDER

The Board orders that the Respondent, Visiting Nurse Services of Western Massachusetts, Inc., Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Service Employees International Union, Local 285, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the following appropriate unit by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed

[26] *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1054 fn. 9 (1994), citing *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302 (1st Cir. 1993), enfg. 310 NLRB 684 (1993). As noted above, the Respondent changed its corporate name from Holyoke Visiting Nurses Association, Inc. (Holyoke) to its present name in about May 1996, and the parties have stipulated that the Respondent is identical to Holyoke.

by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) On request of the Union, rescind the unlawfully implemented change to a biweekly payroll system, changes in holidays, clinical ladders program, enterostomal therapist classification and program, and changes in classifications, reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes, and make the unit employees whole for any losses attributable to its unlawful conduct in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its Holyoke, Massachusetts facility copies of the attached notice marked ''Appendix.''[27] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 1996.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

MEMBER BRAME, dissenting.

Contrary to my colleagues, I find that the stipulated record provides an insufficient basis for deciding the issues presented in this case. Therefore, I would find that the motion to transfer this proceeding to the Board was improvidently granted and would remand the proceeding for a full evidentiary hearing before an administrative law judge.

The complaint alleges that the Respondent, in violation of Section 8(a)(5) and (1), unilaterally implemented certain bargaining proposals during the process of negotiations for a new collective-bargaining agreement with the Union. In my view, the adjudication of these matters requires a more complete understanding of the bargaining that took place between the parties than can be gleaned from the stipulated facts. Specifically, I find that the often cryptic and sometimes conflicting bargaining notes, provided as exhibits to the stipulation of facts, are an unsatisfactory substitute for testimonial evidence by participants in the negotiations, particularly where, as here, the parties have not stipulated that all or any of the notes accurately reflect the parties' discussions in bargaining. For this reason, I do not agree with the Board's decision, in which I did not participate, to accept the stipulation of facts and grant the motion to transfer the proceeding to the Board. Accordingly, I dissent from my colleagues' present decision finding that the Respondent committed the violations alleged in the complaint.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Service Employees International Union, Local 285, AFL–CIO, CLC as the exclusive bargaining representative of our employees in the following appropriate unit by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement:

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by Visiting Nurse Services of Western Massachusetts, Inc., at our Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above on terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind the unlawfully implemented change to a biweekly payroll system, changes in holidays, clinical ladders program, enterostomal therapist classification and program, and changes in classifications, reinstate the terms and conditions of employment in these areas that existed before our unlawful unilateral changes, and make the unit employees whole for any losses attributable to our unlawful conduct.

VISITING NURSE SERVICES OF WESTERN MASSACHUSETTS, INC.